

¹ Pursuant to a stipulation entered into by the parties and filed with the Division on June 8, 2004, the Fund was impleaded. Consistent with the terms of that stipulation, which includes an acknowledgment that respondent is financially unable to pay any benefits that might be awarded to claimant, the ALJ found that the Fund should pay the benefits awarded in the Order.

Likewise, claimant offered no brief in support of his position, although it seems clear that claimant would most certainly argue that the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has been employed with Anderson Services since February 2003. The company deals with pumping out mud traps using a septic truck and hauling trash. Claimant's job was to drive the truck.

The morning of the accident on November 12th, claimant testified he was reloading the power washing machine back onto the truck after a septic line had been cleaned out. The machine weighed approximately 200 pounds. Claimant says he was lifting this machine alone. He leaned up to push the front of the machine onto the truck when he felt what he thought were the muscles in his stomach pull.

At the time of the accident, claimant testified he was working with Derek Anderson, the son of the respondent's owner. According to claimant, he mentioned the pain to Derek Anderson and Mr. Anderson merely joked back to claimant about his age. Claimant finished out the normal workday. While Derek Anderson confirms that he was working with claimant on the day in question, he testified that he is the one who loaded the heavy equipment back into the truck, and that claimant complained of a finger injury that day, saying nothing about hurting or pulling any muscle.

That evening and into the next day, claimant began to experience pain in his side that continued to get worse, but since he thought it was just a pulled muscle he continued to work. On the 14th, claimant called in and talked to Mr. Carrold (Cap) Anderson, respondent's owner and proceeded to take the day off with permission.

According to Mr. Anderson claimant did call in and they did have a conversation. However, he claims that claimant called to say that he was not coming in that day because of the rain, and that he was going to work on a porch instead.

Sometime that evening while claimant was showering, his wife noticed he had an enlarged testicle. On the 17th, claimant went to see the family physician Dr. Hector Fernandez, and found out that he had a hernia and that he needed surgery.

Claimant informed respondent of the situation and his need for surgery as he was leaving the doctor's office. At that point, Mr. Anderson informed claimant that he did not have any workers compensation coverage.

At the doctor's urging, claimant went ahead and had surgery the following week for his hernia. Claimant was released to return to work on December 18th. Claimant however did not return to work. He testified that he received a letter from respondent the Friday after his surgery during his recovery that said he needed to return to work on the following Monday or he would not have a job.

Claimant never notified respondent after he received this letter because he assumed his employer knew of his medical problems and knew he could not work. Claimant stated the other reason he did not go back to work was he concluded there would be hard feelings or tension when he returned.

The ALJ concluded that "it is more probably true than not true" that claimant injured himself while working for respondent on November 12, 2003. This was the only disputed issue presented to the ALJ at the preliminary hearing. After considering the claimant's testimony and that of the other witnesses, Cap Anderson and Derek Anderson, the ALJ found that claimant had established that it was more probably true than not that his injury arose out of and in the course of his employment with respondent. The Board affirms this finding.

The ALJ was in the best position to evaluate the credibility of the witnesses and had the benefit of the medical records which corroborate claimant's version of the events. The Board often gives some deference to the ALJ and does so here. The ALJ's Order is hereby affirmed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 29, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2004.

BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant
Brian R. Collingnon, Attorney for Respondent
Frank Caro, Attorney for the Fund
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director